STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 248952 Muskegon Circuit Court
MICHAEL LEE JENKINS, JR., Defendant-Appellant.	LC No. 02-048059-FH

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of first-degree home invasion in violation of MCL 750.110a(2). His conviction arose from an incident in which he entered a hotel room occupied by Mark Zion and left with items belonging to Zion. He was sentenced as a second-offense habitual offender to 8½ to 30 years' imprisonment. We affirm.

Defendant first asserts that the trial court erred in granting the prosecution's motion, made on the first day of trial, to amend the information to charge defendant with first-degree home invasion in violation of MCL 750.110a(2)[1] rather than breaking and entering with the

[1] MCL 750.110a(2) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

(continued…)

intent to commit a felony or larceny in violation of MCL 750.110[2] without subsequently holding an arraignment and preliminary examination on the new charge. However, the record reflects that defense counsel stipulated to the amendment of the information without a preliminary examination on the new charge after discussions with defendant. Therefore, defendant intentionally relinquished his right to an arraignment and preliminary examination on the charge of first-degree home invasion, thus extinguishing any error and precluding appellate review. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Moreover, this Court has held that "[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Defendant next asserts that his trial counsel was ineffective for failing to move for the suppression of two radios, identified as belonging to Zion, that were found during a search of the hotel room that defendant and two friends were staying in. Defendant's claim that he was denied the effective assistance of counsel is a question of constitutional law subject to de novo review. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). In order to prevail, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

The constitutional protections against unreasonable searches and seizures provided in US Const, Am IV, Am XIV[3] apply to occupants of hotel and motel rooms. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993), citing *Stoner v California*, 376 US 483, 489-490; 84 S Ct 889; 11 L Ed 2d 856 (1964). And under both the United States and Michigan Constitutions, the police must have a valid warrant based on probable cause or be operating within one of the few exceptions to the warrant requirement, such as consent, for a search to be valid. *Id*., 9-10 (citations omitted). "A consent to search permits a search and seizure without a warrant when

(…continued)

[2] MCL 750.110 provides:

> A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, or railroad car is guilty of a felony, punishable by imprisonment for not more than 10 years.

[3] Although the Michigan Constitution and the United States Constitution will generally be construed in the same fashion where the provisions are essentially the same, *People v Reichenbach*, 459 Mich 109, 118-119; 587 NW2d 1 (1998), and our Supreme Court noted that Const 1963, art 1, §11 is substantially the same as US Const, Am IV, *People v Davis*, 442 Mich 1, 9 n 5; 497 NW2d 910 (1993), our Supreme Court specifically declined to discuss Const 1963, art 1, §11 in light of the fact that it found the defendant's Fourth Amendment rights were violated. For the same reasons expressed by the Supreme Court, we also decline to do so here.

the consent is unequivocal, specific, and freely and intelligently given." *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003), citing *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). "The validity of a consent depends on the totality of the circumstances." *Id*. Consent to search must ordinarily be given by the person whose property is searched or who is affected. However, consent to a search may be given by a third party when the third party possesses an equal right of possession or control over the premises. *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997) (citations omitted); *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991) (citation omitted). The prosecution bears the burden of proving that the person giving consent was authorized to do so and did so freely. *Jordan, supra*, 587, citing *People v Wagner*, 104 Mich App 169, 176; 304 NW2d 517 (1981).

In the present case, Brandon Clark, who stayed in the room with defendant, testified that he gave the officers permission to search the room and, upon further questioning, acknowledged that he had no reason not to give such consent. Defendant does not dispute that Clark, as one of the three occupants of the hotel room he was staying in, possessed an equal right of possession or control to enable him to give consent. Nor does defendant assert that Clark's consent was not unequivocal and specific. Rather, defendant asserts that Clark's consent was not "freely and intelligently given" under the totality of the circumstances because Clark testified that he had consumed alcohol and used marijuana the night before the search was conducted. There is no evidence contained in the present record to show that Clark was still suffering any potential negative effects of the alcohol and marijuana at the time he gave the officers permission to search the room. Therefore, defendant has not shown that his trial counsel's decision not to move to suppress the fruits of the search was objectively unreasonable or that, even if it were, the outcome of defendant's trial would reasonably have been different.

Defendant next asserts that the trial court erred by denying his motion for a directed verdict because the first-degree home invasion statute is inapplicable where a hotel room is the place invaded. Defendant moved for a directed verdict at the close of the prosecution's proofs based on his assertion that the prosecution had not presented sufficient evidence for the jury to find beyond a reasonable doubt that all of the essential elements of the crime had been proven. The trial court denied defendant's motion based on the fact that Zion had made an eyewitness identification of defendant, had been in the room when the theft took place, and because the stolen items had been found in defendant's room. Thus, defendant's motion was only brought, and considered by the trial court, based on the ground that the prosecution had not introduced evidence sufficient to support a conviction under the first-degree home invasion statute, MCL 750.110a(2), and not on the ground that MCL 750.110a(2) was inapplicable. Moreover, in addition to not basing his motion on the ground that MCL 750.110a(2) was inapplicable, as described above, defendant stipulated to the prosecution's amending the information to allege first-degree home invasion under MCL 750.110a(2). Therefore, defendant has waived review of this issue. *Chapdelaine, supra*, 177. However, even if we were to review this issue, we find defendant's assertion to be without merit.

Defendant asserts that the breaking and entering statute, MCL 750.110, is the only applicable statute because it specifically references the breaking and entering of a hotel with the intent to commit a felony or larceny. However, the decision of whether to charge an offense and which charge to bring lies within the prosecutor's discretion. *People v Venticinque*, 459 Mich 90, 100-101; 586 NW2d 732 (1998) (citations omitted). This discretion is broad, and is

appropriately exercised by the prosecutor when determining under which of two arguably applicable statutes to charge a defendant. *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996), citing *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672, 683; 194 NW2d 693 (1972).

MCL 750.110a(2) applies when a person breaks and enters a dwelling, or enters a dwelling without permission. MCL 750.110a(1)(a) defines a "dwelling" as "a structure or shelter that is used permanently or temporarily as a place of abode . . . ." Abode is defined as "a place in which a person resides; residence; dwelling; home." *Random House Webster's College Dictionary* (1997), 4. In the present case, the hotel room in which Zion was staying was being used by him as a temporary place of abode, thus making it a dwelling within the meaning of MCL 750.110a(2). Therefore, it was proper for the prosecution to charge defendant under that statute, and it would not have been error for the trial court to deny defendant's motion even if defendant had asserted this ground.

Defendant's final argument is that the trial court's imposition of his 8½ to 30 year sentence, particularly the enhanced maximum sentence of thirty years based on MCL 769.10, violates the constitutional guarantees against cruel or unusual punishment. This Court reviews a trial court's decision to impose an increased sentence as authorized by the habitual offender act for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000).

First-degree home invasion is a class B crime, MCL 777.16f, and defendant received a prior record variable score of 57 and an offense variable score of 6. Thus, under MCL 777.63, which states the minimum sentence ranges for class B offenses, the statutory minimum for defendant's sentence would be 51 to 85 months. However, because defendant was sentenced as a second-offense habitual offender, the upper limit of his minimum sentence is increased by twenty-five percent, to 106 months. MCL 777.21(3)(a). Under MCL 750.110a(5), the maximum sentence for first-degree home invasion is twenty years' imprisonment. However, because defendant was sentenced as a second-offense habitual offender, MCL 769.10(1)(a) provides that the trial court "may . . . sentence the person to imprisonment for a maximum term that is not more than 1½ times the longest term prescribed for a conviction of that offense or for a lesser term." Thus, whether to impose the enhanced maximum sentence is within the discretion of the trial court. *People v Alexander*, 234 Mich App 665, 673-674; 599 NW2d 749 (1999). In the present case, the trial court exercised its discretion, and imposed a maximum sentence of thirty years.

This Court has specifically concluded that the Michigan statutes authorizing enhanced sentences for habitual offenders, particularly MCL 769.10, are constitutional and not cruel and unusual because they are an appropriate exercise of the state's right to protect its citizens from individuals that continually engage in criminal activities, and because "the statutes are based upon additional particular acts of criminal activity and, thus, are not directed toward the status of being a habitual criminal." *People v Potts*, 55 Mich App 622, 634-639; 223 NW2d 96 (1974).

Furthermore, this Court has stated that "[a] trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society." *Reynolds, supra*, 252, citing *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). In the present case,

defendant's maximum sentence of thirty years falls within the statutory maximum limits. The record reflects that the trial court based defendant's enhanced sentence on defendant's having previously been convicted of delivering less than fifty grams of cocaine, a felony offense. First-degree home invasion is a crime of a serious nature, and evinces defendant's inability to conform his conduct to the law. Therefore, both elements stated in *Reynolds, supra*, 252-253 are satisfied, and the trial court did not abuse its discretion.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette